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NO. 91-959

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

SHELL OIL COMPANY, Petitioner

v.

CRUZ PEDRAZA, ET AL., Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "savings clause" of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq. ("OSHA"), expressly forbids preemption of a worker's tort claims against a third party?

2. Whether a worker's personal injury tort claim against a product supplier for its failure to provide warnings and instructions urging safety measures exceeding OSHA standards is necessarily preempted, where it is not impossible to adhere to both OSHA standards and a proper warning?

3. Whether a state law-based products liability lawsuit substantially interferes with the enforcement of Federal occupational safety policy aimed at regulating the conduct of employers?

LIST OF ALL PARTIES

Petitioner, defendant-appellee below, is Shell Oil Company ("Shell"). Its parents, subsidiaries and affiliates is reproduced appended to its petition. (Pet. App. 91).

Respondents, plaintiffs-appellants below are Cruz Pedraza ("Pedraza"), Alejandrina Pedraza, Roberto Pedraza and Mary Ellen Pedraza.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. at 18) is reported at 942 F.2d 48 (1st Cir. 1991). Opinions of the District Court (Pet. App. 18, 24) are reported at 729 F.Supp. 187 (D.Mass. 1990) (granting dismissal on preemption grounds) and at 724 F.Supp. 1 (D.Mass. 1989) (denying summary judgment).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Procedurally, a writ is sought on this case that was dismissed by the District Court on a pre-trial motion, which dismissal was then vacated by the Court of Appeals and the case remanded to the District Court for trial.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED WHERE THERE IS NO CLEAR AND MANIFEST CONGRESSIONAL INTENT IN OSHA TO EXTINGUISH STATE TORT CLAIMS

The "savings clause"[1] of OSHA preserves employees' tort claims against third parties from preemption. Its text

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[1] 29 U.S.C. §654(b)(4), providing as follows:

> Nothing in this Act shall be construed to supercede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

leaves no room for uncertainty in divining its meaning. It is a mandatory command that in nothing found elsewhere in OSHA can be construed to affect employees' rights to bring third party tort claims. This "savings clause" evinces Congressional intent to leave employees common law rights unaffected.

To the extent that another OSHA provision bars state interference with any occupational health and safety issue unless there is no federal standard in effect, 29 U.S.C. §667(a), it is distinguishable.

Congress' aim in enacting OSHA was not to eliminate state regulation, but to establish a minimum federal standard and remove the competitive disadvantage suffered by states which were imposing safety (and its added costs) on employers. Congress was not seeking to impose nationwide uniformity, it only wanted to establish a minimum of level of safety in

all states.[2]/ It wanted to remove the competitive advantage of having a cheaper operational base in states which were not imposing a modicum of safety.

Contrary to the Shell's argument, there was no Congressional intent to facilitate commerce by enacting a uniform national standard. It sought only to prevent the inevitable "race to the bottom" which occurred in states which for economic reasons did not follow safety practices, resulting in a cheaper operational base. See, Subcomm. on Labor and Public Welfare, 92d Congress, 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Comm. Print 1970), at 444 (remarks of Sen. Dominick); at 297

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[2]/ Congress' intentions in enacting OSHA mirror the aims of the Federal Aviation Act, 49 U.S.C. §1301, et seq., setting forth only for minimum standards and containing a like savings clause. See Holliday v. Bell Helicopters Textron, Inc., 747 F.Supp. 1396 (D.Hawaii 1990) (products liability claim not preempted).

(remarks of Sen. Saxbe) (OSHA standards would provide a floor of federal health and safety standards upon which states can build).

The Secretary of Labor's exposure limits for epichlorhydrin (ECH), like all OSHA standards, set only a "nationwide floor of effective safety and health standards. [Citation omitted]. It was not fear that the states would apply more stringent standards and penalties than OSHA that concerned Congress, but that the states would would apply lesser ones which would not provide the necessary level of safety. The comment has been made: 'Congress . . . sought uniform national stardards not to facilitate commerce but to prevent the 'race to the bottom' that occurred when each state set its own standard., Congress favored a federal law' so that those states providing vigorous

protection would not be disadvantaged by those that did not.'" People v. Chicago Magnet Wire Corp., 126 Ill.2d 356, ___, 534 N.E.2d 962, 967 (1989), cert. denied, ___ U.S. ___, 107 L.Ed.2d 21, 110 S.Ct. 52 (1989), citing United Steelworkers v. Auchter, 763 F.2d 728, 734 (3d Cir. 1985). Accord, People v. Pymm, 76 N.Y.2d 511, 561 N.Y.S.2d 687, 561 N.E.2d 1 (1990), cert. denied, ___ U.S. ___, 112 L.Ed.2d 1046, 111 S.Ct. 958 (1991).

This case is likewise not preempted by virtue of implied preemption, whether by OSHA occupying the entire field of workplace safety or by a conflict between OSHA and state law making compliance with both physically impossible.

OSHA's imposes safety practices on employers, it does not govern or regulate the conduct of products suppliers and other third parties. Tort claims of this sort are not motivated by safety concerns. Tort

law is compensatory, not regulatory. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257-258, 78 L.Ed.2d 443, ___, 104 S.Ct. 615, 620 (1984). The aim of personal injury claims is not to cause a direct and substantial effect on the enforcement of OSHA standards. Compare, English v. General Electric Co., 495 U.S. ___, ___, 110 L.Ed. 65, 78, 110 S.Ct. 2270, ___, (1990).

Moreover, it was not physically impossible for Pedraza's employer to comply with the relevant OSHA regulations and an adequate warning. Products warnings calling for the use of respirators as added protection from toxic vapors where OSHA may require only ventilation do not present an inexorable dilemma for the employer. Cf. Wisconsin Public Intervenor v. Mortier, 501 U.S. ___, ___, 115 L.Ed.2d 532, 549, 111 S.Ct. 2476, ___ (1991) (no conflict preemption where obtaining municipal

aerial pesticide spraying permit and complying with FIFRA were not impossible).

The imposition of civil liability against the supplier of a product defective by virtue of an inadequate warning complements federal workplace safety policy. There are no dangers to the integrity of the OSHA enforcement scheme posed by employers implementing safety measures more prophylactic than OSHA standards require. Cf. Silkwood v. Kerr-McGee Corp., 464 U.S. 241, 245, 78 L.Ed.2d 443, ___, 104 S.Ct. 615, 620 (1984) (nothing inconsistent with federal policy of minimizing release of radiation and the imposition of punitive damages for escape of plutonium).

II. THE FIRST CIRCUIT'S OPINION DID NOT CONFLICT WITH ITS OWN PREEMPTION RULINGS OR WITH RULINGS OF OTHER CIRCUITS

The First Circuit's opinion below was fully consistent with Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988) and Associated Industries of Massachusetts ("AIM") v. Snow, 898 F.2d 274 (1990).

In Wood, the Court of Appeals was construing the Federal Motor Vehicle Safety Standards Act, 15 U.S.C. §1381, et seq., which spelled out its intention to establish one federal standard to facilitate commerce. Understandably, it found a common law claim targeting the federally regulated automaker with failing to deviate from federal standards (which permitted no deviation) was preempted. By contrast, OSHA permits implementation of safer practices, did not set a national standard for the sake of facilitating commerce, and regulates only employers and not products suppliers.

In AIM, the Circuit Court fashioned an "effect" test to determine if state worker safety regulations infringed on federal enforcement under OSHA. To the extent that the regulations serve some broader public purpose they are permissible; they are preempted only where their sole effect is worker protection. Certainly Pedraza's claim for damages does not have the "sole effect" of regulating worker safety.

Although formulated in different terms, the First Circuit's opinion in AIM is in accord with the "primary purpose" test enunciated in New Jersey Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985) and the "substantial purpose test" contained in Environmental Encapsulating Corp. v. New York, 855 F.2d 48, 57 (2d Cir. 1988) (saving from preemption state regulations which had a legitimate and substantial broader purpose of promoting public safety and health).

There is no intractable conflict between the Circuit Courts of Appeal requiring this Court's intervention. To the extent that this Court may harmonize these decisions in deciding Gade v. National Solid Wastes Assn., (No. 90-1676) cert. granted, ___ U.S.L.W. ___ (December ___, 1991), granting certiorari in Pedraza's case is unnecessary.

III. NO JURY AWARD AGAINST A PRODUCTS SUPPLIER COULD CONSTITUTE STATE REGULATION UNDULY INTERFERING WITH FEDERAL POLICY

Shell equates the effect of a jury verdict in Plaintiffs favor as congruent with a state agency issuing "inconsistent" standards, citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). (See Pet. App. at 13). This proposition does not ring true. Although Garmon contains broad phraseology, it has no bearing on whether tort awards are equivalent to administra-

tive regulations for preemption purposes. It held that the Court had no jurisdiction because Congress expressly occupied the field by providing the National Labor Relations Board as the exclusive tribunal with its own set of remedies.

In enacting OSHA, Congress set up no alternative means of redress for those injured by preempted third party claims. This Court has refused to find implied preemption of common law claims where to do so would leave aggrieved parties without a remedy. Indeed, such action may deprive victims of substantive due process. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88, 57 L.Ed.2d 595, ___, 98 S.Ct. 2620, ___ (1978). The absence of an alternative remedy for supposedly displaced common law claims is

strong evidence that Congress did not intend preemption. It is inconceivable that Congress intended to leave victims with no remedy at all. Silkwood, supra at 251, 78 L.Ed. ___, 104 S.Ct. at 623.

Far from unduly interfering with OSHA's aims, worker's third party claims complement workplace safety policy. Such lawsuits further OSHA's goals and should be encouraged, not eclipsed. As a commentator embraced by Shell rightly points out, OSHA has weak enforcement sanctions and its infrequent monitoring hampers regulatory performance. In addition, OSHA regulations reduce injuries only modestly and the chance of seeing an OSHA inspector in a given year is comparable to the chance of seeing Haley's comet. Viscusi, Reforming Products Liability, at 191. Any indirect effect third party lawsuits might have on making industrial products safer is sorely needed.

IV. A SWEEPING CHANGE IN LIABILITY STANDARDS FOR PRODUCTS SUPPLIERS BASED ON THEIR UNPROVEN COMPLIANCE WITH OSHA STANDARDS IS NOT IN ORDER

To confer immunity on product suppliers and other third party tortfeasors responsible for workplace injuries where an OSHA standard was "in effect" would radically change existing liability standards.[3]/

It is black letter law that a product supplier's compliance with statutes and regulations does not automatically preclude liability as a matter of law. Restatement (Second) of Torts, §288C. See White v. W.G.M. Safety Co., 707 F.Supp. 544, 548

3/ The state of the law as exists at present is as expressed in Shell's counsel's treatise on products liability. He rightly points out that OSHA is directed solely at employers (and not at products suppliers), however OSHA standards may be urged to juries as the standard of care to which products suppliers must conform. A.W. Weinstein, A.D. Twerski, et al., Products Liability and the Reasonably Safe Product, at 314.

(S.D.Ga. 1988) (OSHA regulations regarding employees' exposure to silica and silicates). A jury may well find that the mere compliance with statute or regulation was unreasonable. Cf. The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), cert. denied sub nom., Eastern Transp. Co. v. Northern Barge Corp., 287 U.S. 662 (1932) (compliance with industry standards not dispositive; "a whole calling may have unduly lagged in the adoption of new and available devices").

But what if the level of ECH at Pedraza's workplace exceeded levels permitted by OSHA?[4]/ Would Shell still be immunized because OSHA standards were "in effect" but not being followed? Shell does

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[4]/ Shell urges "OSHA limits were met" by Plaintiff's employer, pointing to experimental tests carried out several years after Plaintiff's exposure. If, in the event the trial court should deem such test data admissible, the jury would not be bound to accept this testimony as true. Hickman v. Thompson C. Thompson Co., 644 F.Supp. 1531 (D.Colo. 1986) (weight to be attached to laboratory test data is for jury).

not favor the Court with any guidance on this point. It is sufficient to note that at this juncture there has been no jury finding (and it is not conclusively established) that Pedraza's exposure to epichlorhydrin exceeded or fell below OSHA standards.

There is simply no textual mandate in OSHA demonstrating that third party claims posing no direct and substantial threat to federal policy must be extinguished.

CONCLUSION

The Petition for Certiorari should be denied.

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